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10 and successor to Borel Private Bank & Trust
Company
11

12 UNITED STATES BANKRUPTCY COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN JOSE DIVISION

15 In re:
16 272 E. Santa Clara Grocery, LLC,
17 Debtor.

CASE NO. 13-53491

CHAPTER 11

**EX PARTE APPLICATION FOR ORDER
OF EXAMINATION OF PERSON MOST
KNOWLEDGABLE OF ERAS
ENVIRONMENTAL, INC. AND FOR
PRODUCTION OF DOCUMENTS
PURSUANT TO BANKRUPTCY RULE
2004**

22
23 **TO THE HONORABLE STEPHEN L. JOHNSON, UNITED STATES BANKRUPTCY**
24 **COURT JUDGE AND PARTIES IN INTEREST:**

25 Secured Creditor Boston Private Bank & Trust Company (“BPB”), formerly known as and
26 successor to Borel Private Bank & Trust Company, submits its Ex Parte Application for Order
27 Requiring Appearance of the person most knowledgeable at ERAS Environmental, Inc.
28 (“ERAS”) for Examination and Production of Documents, pursuant to Federal Rule of

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1 Bankruptcy Procedure 2004. The Application is supported by the Declaration of Stephen J.
2 Kottmeier ("Counsel Decl.") filed in this matter as Docket No. 31 (#2) and the records of this
3 bankruptcy case. The Application is based on the following facts:

4 **FACTUAL BACKGROUND**

5 1. This Chapter 11 case was commenced on June 27, 2013 (the "Petition Date") by
6 debtor and debtor in possession 272 E. Santa Clara Grocery, LLC ("Debtor").

7 2. Based upon the schedules and statement of affairs in this matter and publicly
8 available records, BPB is informed and believes that prior to the Petition Date, the Debtor
9 retained ERAS Environmental Inc. to conduct environmental investigation, to deal with County
10 or State environmental agencies and to prepare studies or reports with respect to that certain real
11 property located at 272 E. Santa Clara Street, San Jose, California (the "Property").

12 3. The Debtor's principal asset in this case is the Property. BPB holds the senior lien
13 on the Property securing a loan with an outstanding principal balance of \$3,341,017.20. (Counsel
14 Decl. Exh. 1 ("Scheiber Declaration"), at ¶7.)

15 4. The Debtor is not BPB's borrower. BPB's borrower is instead an unrelated entity,
16 Kimomex Santa Clara, LLC ("Kimomex"). BPB made a secured loan to Kimomex in 2008 in the
17 original principal amount of \$3,600,000.00. At the time, Kimomex owned the Property. To
18 secure the loan, Kimomex executed and delivered a Deed of Trust and an Assignment of Rents in
19 favor of BPB, both of which were recorded against the Property on July 18, 2008. (Counsel
20 Decl., Exh. 1 at ¶4, and Exhs. B and C thereto.)

21 5. On or about May 14, 2009, unbeknownst to BPB, Kimomex apparently borrowed
22 a sum from a group of individuals and secured its obligation to said parties through a deed of trust
23 dated on said date and recorded on May 21, 2009. (*Id.*, Exh. 1 at ¶ 6, and Exh. D, thereto.) The
24 trustee under the junior deed of trust was Investment Grade Loans, Inc. ("IGLI"). BPB is
25 informed and believes that IGLI is a "hard money lender" who arranged for the junior loan and
26 that IGLI is owned and operated by Andrew Lewis, the Debtor's managing member.

27 6. The junior deed of trust is subordinate to BPB's Deed of Trust and to its
28 Assignment of Rents, both of which were recorded and became encumbrances against

1 Kimomex's title before Kimomex granted the junior deed of trust. Later, IGLI, the trustee under
2 the junior deed of trust, caused that deed of trust to be foreclosed through its power of sale. (*Id.*)
3 The Property was then sold to the beneficiaries at the foreclosure sale. (*Id.*, Exh. E) The
4 Trustee's Deed, dated October 27, 2011, was recorded on April 20, 2012. (*Id.*) The beneficiaries
5 thereafter conveyed all of their right, title and interest in the Property to Debtor by Grant Deed
6 recorded on April 20, 2012. (*Id.*, Exh. F) Debtor is therefore the successor to the beneficiaries of
7 the junior deed of trust and, through them, Kimomex.

8 7. The borrower Kimomex defaulted on its loan from BPB by its failure to pay
9 monthly payments and by failure to pay property taxes. In addition, BPB's Deed of Trust
10 expressly provides that any transfer of the Property (by lien or sale) without BPB's consent
11 violates the "Due On Sale" covenant in the Deed of Trust entitling BPB to accelerate the Loan.
12 (Counsel Decl., Exh. 1, at 7 and Exh. B thereto, p.2.) BPB did not consent to any of the transfers
13 of the Property through the junior deed of trust, the foreclosure sale of the property by the
14 beneficiaries to themselves or the deeding of the Property to the Debtor. The "due on sale"
15 defaults can be cured only by payment in full. Bernhardt, *California Mortgages, Deeds of Trust,*
16 *and Foreclosure Litigation*, §8.20.b (4th ed. 2013).

17 8. The Debtor and its predecessors assert that the Property has an environmental
18 issue that requires remediation and a related governmental restriction that must be resolved before
19 the Property can be marketed for sale. The Debtor appears to have no liquid assets available to
20 address these matters. Aside from a few hundred dollars in a bank account, the Debtor's only
21 other listed personal property assets are several unliquidated claims against third parties about
22 which it gives very little information and for which it provides no values. [Dkt. 1, pp. 8-9] The
23 Debtor has asserted that it lacks sufficient funds to pay the environmental consultants to complete
24 the environmental report or study commenced prior to the Petition Date.

25 9. The Debtor's Statement of Financial Affairs and Schedules disclose little
26 information about any environmental issues related to the Property. Some information is
27 available on the County of Santa Clara Department of Environmental Health website at
28 <http://www.sccgov.org/sites/deh/HMCD/HazMat/HMDocs/Pages/Documents.aspx> by navigating

1 to the “View Local Oversight Program Public Record Document Search” link and typing in the
2 street number “272.” However, that information now is several months to several years old. No
3 more recent information has been supplied by the Debtor.

4 **REQUEST FOR EXAMINATION AND PRODUCTION OF DOCUMENTS**
5 **UNDER BANKRUPTCY RULE 2004**

6 10. According to its website, ERAS is an environmental consulting company that
7 specializes in Phase 1 and Phase 2 Environmental Site Assessments for due diligence. (See
8 www.eras.biz) Other main services include the project design and implementation of complex
9 subsurface hydrogeological assessments, and monitoring, extraction and remediation well
10 installation. *Id.* ERAS claims that it has a reputation for responsive, high quality but cost
11 effective Phase 1 and 2 projects based upon close compliance with appropriate environmental
12 regulations. *Id.*

13 11. Based on its representations of its work capabilities and the Debtor’s claims about
14 it, BPB is informed and believes that ERAS has relevant information that will materially aid in
15 the investigation of the Debtor’s acts, conduct, property, assets, liabilities, and which will impact
16 the administration of this bankruptcy case.

17 12. Pursuant to Federal Rule of Bankruptcy Procedure (“FRBP”) 2004(a), “on motion
18 of any party in interest, the court may order the examination of any entity.” The scope of an
19 examination under FRBP is very broad:

20 The examination of the debtor under § 343 of the Code may relate only to
21 the acts, conduct, or property or to the liabilities and financial condition of the
22 debtor, or to any matter which may affect the administration of the debtor's
23 estate, or to the debtor's right to a discharge. In ... a reorganization case under
24 chapter 11 of the Code, other than for the reorganization of a railroad, the
25 examination may also relate to the operation of any business and the
26 desirability of its continuance, the source of any money or property acquired
27 or to be acquired by the debtor for purposes of consummating a plan and the
28 consideration given or offered therefor, and any other matter relevant to the
case or to the formulation of a plan. (FRBP 2004(b))

13. BPB seeks to obtain documents from and testimony of the person most
knowledgeable at ERAS about any investigation of the Property, any reports prepared by ERAS

1 with respect to environmental issues in connection with the Property, and communications ERAS
2 has had with the Debtor, its predecessors or the County or State regarding the Property or matters
3 related to this case. This information directly relates to the value of the Debtor's Property, the
4 liabilities of the Debtor, the Debtor's administration of the case and will assist in determining
5 whether any reorganization plan proposed by the Debtor may be viable.

6 14. BPB therefore needs to examine ERAS on the topic and all relevant records and
7 documents about such matters, as more specifically set forth in **Exhibit "A"**, attached hereto.

8 15. The documents to be produced relate to the property of the bankruptcy estate and
9 may affect the administration of the estate and therefore fall under the proper scope of production
10 of documentary evidence as delineated under Rule 2004(b) of the Federal Rules of Bankruptcy
11 Procedure.

12 16. On this basis, BPB requests that this Court order ERAS to appear for examination
13 and produce documents as indicated below.

14 17. BPB is concurrently herewith serving this Application (by ECF filing and service)
15 upon counsel for the Debtor and the Office of the United States Trustee and by overnight delivery
16 upon ERAS. In view of the routine nature of the relief requested, BPB submits that no additional
17 notice of the Application is necessary, and that a hearing thereon should not be required or if
18 required, be held concurrently with the hearing on BPB's other pending Rule 2004 examinations.

19 **RELIEF REQUESTED**

20 WHEREFORE, BPB respectfully requests that this Court enter an order as follows:

21 1. Ordering ERAS' most knowledgeable person to appear at the office of Hopkins &
22 Carley, a law corporation, 70 South First Street, San Jose, California, 95113 on September 6,
23 2013, at 9:30 a.m., to be examined under oath by counsel for BPB before a certified court reporter
24 in accordance with Bankruptcy Rule 2004 on the topics described in **Exhibit "A"** attached hereto
25 and incorporated herein by reference. Such examination shall be taken from day to day until
26 completed.

27 2. Ordering ERAS to produce the documents described in **Exhibit "A"** attached
28 hereto and incorporated herein by reference, for inspection and copying by counsel for BPB at the

1 offices of Hopkins & Carley, a Law Corporation, 70 South First Street, San Jose, California,
2 95113 on or before September 6, 2013, at 9:30 a.m.

3
4 Dated: August 12, 2013

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6 HOPKINS & CARLEY
7 A Law Corporation

8
9 By: /s/ Stephen J. Kottmeier
10 Stephen J. Kottmeier
11 Attorneys for Secured Creditor BOSTON
12 PRIVATE BANK & TRUST COMPANY,
13 formerly known as and successor to Borel
14 Private Bank & Trust Company
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1 EXHIBIT A

2 I. TOPICS ON WHICH A MOST KNOWLEDGABLE CORPORATE
3 REPRESENTATIVE IS TO APPEAR AND TESTIFY:

4 1. The services or work undertaken by ERAS Environmental, Inc. regarding
5 any actual or possible soil or groundwater contamination or other environmental or
6 contamination issues on the property at 272 E. Santa Clara Street, San Jose, Ca., including
7 without limitation (i) all testing, reports, environmental assessments or other studies or
8 evaluations done with respect to such issues, whether completed or in draft form and (ii)
9 all communications with the DEBTOR, Andrew Lewis, Investment Grade Loans, Inc., the
10 County of Santa Clara, the State of California or any other person or entity regarding such
11 matters.

12 2. All communications (written or oral) between any representative of ERAS
13 Environmental, Inc. and any representative of the Debtor 272 E. Santa Clara Grocery,
14 LLC since the filing of this Bankruptcy Case on or about June 27, 2013 regarding this
15 Case or matters related to it.

16 3. ERAS' contractual relationship with the Debtor 272 E. Santa Clara
17 Grocery, LLC or its affiliates, the scope of work for which it has been engaged for the
18 property at 272 E. Santa Clara Street, San Jose, and amounts paid to it or owed to it for
19 such work.

20
21 II. DOCUMENTS TO BE PRODUCED:

22 Definitions applicable to requests:

23 1. The term "WRITINGS" has the meaning set forth in California Evidence Code
24 section 250 (quoted in the following paragraph) and includes all electronic records as well as hard
25 copy documents:

26 "Writing" means handwriting, typewriting, printing, photostating,
27 photographing, photocopying, transmitting by electronic mail or
28 facsimile, and every other means of recording upon any tangible thing,
any form of communication or representation, including letters, words,
pictures, sounds, or symbols, or combinations thereof, and any record

1 thereby created, regardless of the manner in which the record has been
2 stored.”

3 2. “DEBTOR” means 272 E. Santa Clara Grocery, LLC, debtor in possession
4 in Bankruptcy Case No. 13-53491, Northern District of California.

5 4. “BANKRUPTCY CASE” means Bankruptcy Case No. 13-53491 filed in
6 the Bankruptcy Court of the Northern District of California, San Jose Division.

7 Writings To Be Produced:

8 1. All WRITINGS which in any way relate to any actual or possible soil or
9 groundwater contamination or other environmental or contamination issues on the
10 property at 272 E. Santa Clara Street, San Jose, Ca., including without limitation (i) all
11 communications with the DEBTOR, Andrew Lewis, Investment Grade Loans, Inc., the
12 County of Santa Clara, the State of California or any other person or entity regarding such
13 issues and (ii) all reports, environmental assessments or other studies or evaluations done
14 with respect to such issues, whether completed or in draft form.

15 2. All WRITINGS which constitute or record any communications (written or oral)
16 between any representative of ERAS Environmental, Inc. and any representative of the
17 Debtor 272 E. Santa Clara Grocery, LLC since the filing of this Bankruptcy Case on or
18 about June 27, 2013.

19 3. All WRITINGS which constitute or evidence ERAS’ contractual relationship with
20 the Debtor 272 E. Santa Clara Grocery, LLC or its affiliates, the scope of work for which
21 it has been engaged for the property at 272 E. Santa Clara Street, San Jose, and amounts
22 paid to it or owed to it for such work.